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ALEXANDER L. STEVAS
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No. 81-2215

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

H. L. MOORE DRUG EXCHANGE, division of/and LEVITT INDUSTRIES, INC.,

Petitioners,

vs.

ELI LILLY AND COMPANY,

Respondent.

OPPOSITION TO MOTION TO DEFER CONSIDERATION OF PETITION FOR A WRIT OF CERTIORARI

By the present motion, petitioner H. L. Moore Drug Exchange ("Moore") seeks to have this Court defer consideration of Moore's Petition for a Writ of Certiorari, which was filed on May 25, 1982. Respondent Eli Lilly and Company ("Lilly") filed its brief in opposition on June 28, 1982.

The Petition for Certiorari seeks review of a decision by the Court of Appeals for the Second Circuit filed in the above action on October 16, 1981 reversing a jury verdict in Moore's favor and vacating an injunction compelling Lilly to continue doing business with Moore. Because Moore filed a motion for reargument and a suggestion for rehearing en banc in the Second Circuit, the injunction originally issued by the District Court remained in effect until after the Second Circuit denied Moore's request for rehearing and rehearing en banc on December 30, 1981, and Moore's original time to file its Petition for Certiorari did not expire until March 29, 1982.

Moore then sought and received from this Court two extensions of time to file its Petition for Certiorari, resulting in a maximum extension of 60 days until May 28, 1982. Moore now seeks deferral of consideration of its Petition until at least mid-September, 1982, assuming a Petition for Certiorari is filed in Schwimmer v. Sony Corp. of America, 677 F.2d 946 (2d Cir. 1982) on August 16, 1982, as counsel asserts it will do, and Sony files a brief in opposition in 30 days. If, of course, either party in Schwimmer seeks a further extension, Moore's request for a deferral in this action would result in a further delay of consideration of Moore's Petition.

In making the present motion, Moore fails to note that it is concurrently seeking a writ of injunction in this action from the Court of Appeals for the Second Circuit under the All Writs Statute, 28 U.S.C. § 1651. The injunction sought would require Lilly, which was granted judgment dismissing the complaint in the Court of Appeals, to continue doing business with Moore until this Court disposes of the case. Although Lilly does not believe the motion for an injunction should be granted, if it is, the instant motion for deferral would only prejudice Lilly by further delaying the time when Lilly would be free to cease doing business with Moore, notwithstanding the Second Circuit's decision that it was free to do so last October, over nine months ago.

Supreme Court Rule 19.4 provides a procedure for seeking joint review of cases which a petitioner considers to be related. Moore has offered no reason for its failure to comply with this Rule. The Schwimmer case was decided on May 3, 1982, almost four weeks before Moore filed its Petition for Certiorari in this case. Moore sought and received an extension of time to file its Petition for Certiorari in

this case for the avowed purpose of treating the Second Circuit's decision in Schwimmer simultaneously. In fact, the Petition for Certiorari in this case cites and discusses the Schwimmer decision. Had Moore, whose counsel also represents the losing plaintiff in Schwimmer, followed the procedure set out in Rule 19.4, instead of pursuing its present tactical course, there would have been no potential for prejudicial delay to Lilly. Moore should not now be rewarded for flouting the procedures provided for by the Rules of this Court.

Finally, in its motion for deferral, Moore argues that the Schwimmer case is in conflict with cases in other circuits. In contrast, the Petition for Certiorari in this case makes no such claim, nor could such a claim have been made. The only justification put forward in Moore's motion for giving joint treatment to the instant case and Schwimmer is "[b]ecause the Schwimmer v. Sony decision cites Moore v. Lilly." That is a wholly inadequate reason to defer the resolution of this case, and Lilly respectfully requests that Moore's motion be denied.

Dated: July 21, 1982

Edward N. Sherry
by David B. Hecht

EDWARD N. SHERRY
DEWEY, BALLANTINE, BUSHBY, PALMER & WOOD
Attorneys for Respondent
140 Broadway
New York, New York 10005
(212) 820-1100

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

DAVID B. HOWORTH, being duly sworn, deposes and says:

1. On July 23, 1982, pursuant to Rule 28.3 of the Supreme Court, I served one copy of the foregoing Opposition to Motion to Defer Consideration of Petition for a Writ of Certiorari on counsel for petitioner herein by depositing it in a United States mailbox, with first class postage prepaid, addressed to: Milton A. Bass, Esq., Bass, Ullman & Lustigman, 747 Third Avenue, New York, New York 10017.

2. All parties required to be served have been served.

David B. Howorth

Sworn to before me this
23rd day of July, 1982

Notary Public

DAVID A. RUSO
Notary Public, State of New York
No. 31-4782543
Qualified in New York County
Commission Expires March 30, 1984